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STATUS OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS

Note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva addressed to the Secretary-General

As is well known, the Commission on Human Rights has attached, and is continuing to attach, the highest importance to the implementation of the International Covenant on Civil and Political Rights, particularly to its provisions from which no derogation is permissible. The Commission has, inter alia, examined an important study of the implications for human rights of recent developments concerning situations known as states of seige and emergency, prepared by Mrs. Nicole Questiaux (E/CN.4/Sub.2/1982/15) and has requested that the Sub-Commission pursue its consideration of this matter (Commission decision 1984/104).

The interpretation and application of the limitation and restriction clauses of the Covenants have also become matters of great concern and the Human Rights Committee, in its individual views adopted under the Optional Protocol, as well as in its general comments, has sought to ensure that those clauses of the International Covenant on Civil and Political Rights are interpreted and applied in a manner consistent with the objects and purposes of the Covenant.

The importance of the above-mentioned issue led a number of non-governmental organizations to sponsor a high-level international conference on the limitation and derogation provisions of the International Covenant on Civil and Political Rights. The Conference was held at Siracusa (Italy) from 30 April to 4 May 1984. It was sponsored by the following organizations: the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights and the International Institute of Higher Studies in Criminal Sciences.

The participants at the Conference included professors, practitioners and other experts in human rights from all regions of the world. The Conference resulted in the adoption of a series of pertinent principles entitled "The Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights".

In the view of the Government of the Netherlands it would be extremely useful if the members of the Commission on Human Rights, as well as the members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Human Rights Committee were acquainted with these principles and could examine them more closely, if they so wish. Accordingly, the Government of the Netherlands requests that the "Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights" be circulated as an official document of the forty-first session of the Commission on Human Rights under the agenda item pertaining to the International Covenants on Human Rights.

Annex

THE SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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Introduction

(i) A group of 31 distinguished experts in international law, convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights, and the International Institute of Higher Studies in Criminal Sciences, met in Siracusa, Sicily, in April and May 1984 to consider the limitation and derogation provisions of the International Covenant on Civil and Political Rights. The participants came from Brazil, Canada, Chile, Egypt, France, Greece, Hungary, India, Ireland, Kuwait, the Netherlands, Norway, Poland, Switzerland, Turkey, the United Kingdom, the United States of America, the United Nations Centre for Human Rights, the International Labour Organisation (ILO) and the sponsoring organizations.

(ii) The participants were agreed upon the need for a close examination of the conditions and grounds for permissible limitations and derogations enunciated in the Covenant in order to achieve an effective implementation of the rule of law. As frequently emphasized by the General Assembly of the United Nations, a uniform interpretation of limitations on rights in the Covenant is of great importance.

(iii) In examining these limitations and derogations the participants sought to identify:

Their legitimate objectives,

The general principles of interpretation which govern their imposition and application, and

Some of the main features of the grounds for limitation or derogation.

(iv) It was recognized that other criteria determined the scope of rights in the Covenant, e.g. the concept of arbitrariness, but time was not available to examine them. It was hoped that it might be possible to examine these other limits on some future occasion.

(v) The participants were agreed that:

(a) There is a close relationship between respect for human rights and the maintenance of international peace and security; indeed the systematic violation of human rights undermines national security and public order and may constitute a threat to international peace;

(b) Notwithstanding the different stages of economic development reached in different States, the implementation of human rights is an essential requirement for development in the broadest sense.

(vi) These principles are considered by the participants to reflect the present state of international law, with the exception of certain recommendations indicated by the use of the verb "should" instead of "shall".

PART I. THE LIMITATION CLAUSES IN THE COVENANT

A. General interpretative principles relating to the justification limitations */

1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.

2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.

3. All limitation clauses shall be interpreted strictly and in favour of the rights at issue.

4. All limitations shall be interpreted in the light and context of the particular right concerned.

5. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.

6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.

7. No limitation shall be applied in an arbitrary manner.

8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.

9. No limitation on a right recognized by the Covenant shall discriminate contrary to article 2, paragraph 1.

10. Whenever a limitation is required in the terms of the Covenant to be "necessary", this term implies that the limitation:

(a) Is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,

(b) Responds to a pressing public or social need,

(c) Pursues a legitimate aim, and

(d) Is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the State.

13. The requirement expressed in article 12 of the Covenant, that any restrictions be consistent with other rights recognized in the Covenant, is implicit in limitations to the other rights recognized in the Covenant.

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*/ The term "limitations" in these principles includes the term "restrictions" as used in the Covenant.

14. The limitation clauses of the Covenant shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding on the State.

B. Interpretative principles relating to specific limitation clauses

"Prescribed by law"

15. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

16. Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.

17. Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.

18. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.

"In a democratic society"

19. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the limitation clauses it qualifies.

20. The burden is upon a State imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society.

21. While there is no single model of a democratic society, a society which recognizes, respects and protects the human rights set forth in the Charter of the United Nations and the Universal Declaration of Human Rights may be viewed as meeting this definition.

"Public order (ordre public)"

22. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

23. Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

24. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts or other competent independent bodies.

"Public health"

25. Public health may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

26. Due regard shall be had to the International Health Regulations of the World Health Organization.

"Public morals"

27. Since public morality varies over time and from one culture to another, a State which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.

28. The margin of discretion left to States does not apply to the rule of non-discrimination as defined in the Covenant.

"National security"

29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation, its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

32. The systematic violation of human rights undermines national security and may jeopardize international peace and security. A State responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

"Public safety"

33. Public safety means protection against danger to the safety of persons, to their life or physical integrity or serious damage to their property.

34. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

"Rights and freedoms of others" or the "Rights and reputations of others"

35. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.

36. When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to the rights from which no derogation may be made under article 4 of the Covenant.

37. A limitation to a human right based upon the reputation of others shall not be used to protect the State and its officials from public opinion or criticism.

Restrictions on public trial

38. All trials shall be public unless the Court determines in accordance with law that:

The press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open court showing that the interest of the private lives of the parties or their families or of juveniles so requires; or

The exclusion is strictly necessary to avoid publicity (a) prejudicial to the fairness of the trial or (b) endangering public morals, public order (ordre public) or national security in a democratic society.

PART II. DEROGATIONS IN A PUBLIC EMERGENCY

A. "Public emergency which threatens the life of the nation"

39. A State party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

(a) Affects the whole of the population and either the whole or part of the territory of the State, and

(b) Threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under article 4.

41. Economic difficulties per se cannot justify derogation measures.

B. Proclamation, notification and termination of a public emergency

42. A State party derogating from its obligations under the Covenant shall make an official proclamation of the existence of a public emergency threatening the life of the nation.

43. Procedures under national law for the proclamation of a state of emergency shall be prescribed in advance of the emergency.

44. A State party derogating from its obligations under the Covenant shall immediately notify the other States parties to the Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and the reasons by which it was actuated.

45. The notification shall contain sufficient information to permit the States parties to exercise their rights and discharge their obligations under the Covenant. In particular it shall contain:

(a) The provisions of the Covenant from which it has derogated;

(b) A copy of the proclamation of emergency, together with the constitutional provisions, legislation, or decrees governing the state of emergency in order to assist the States parties to appreciate the scope of the derogation;

(c) The effective date of the imposition of the state of emergency and the period for which it has been proclaimed;

(d) An explanation of the reasons which actuated the Government's decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency;

(e) A brief description of the anticipated effect of the derogation measures on the rights recognized by the Covenant, including copies of decrees derogating from these rights issued prior to the notification.

46. States parties may require that further information necessary to enable them to carry out their role under the Covenant be provided through the intermediary of the Secretary-General.

47. A State party which fails to make an immediate notification in due form of its derogation is in breach of its obligations to other States parties and may be deprived of the defences otherwise available to it in procedures under the Covenant.

48. A State party availing itself of the right of derogation pursuant to article 4 shall terminate such derogation in the shortest time required to bring to an end the public emergency which threatens the life of the nation.

49. The State party shall, on the date on which it terminates such derogation, inform the other States parties, through the intermediary of the Secretary-General of the United Nations, of the fact of the termination.

50. On the termination of a derogation pursuant to article 4, all rights and freedoms protected by the Covenant shall be restored in full. A review of the continuing consequences of derogation measures shall be made as soon as possible. Steps shall be taken to correct injustices and to compensate those who have suffered injustice during or in consequence of the derogation measures.

C. "Strictly required by the exigencies of the situation"

51. The severity, duration and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.

52. The competent national authorities shall have a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.

53. A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitation clauses of the Covenant would be adequate to deal with the threat to the life of the nation.

54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present or imminent danger and may not be imposed merely because of an apprehension of potential danger.

55. The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.

56. Effective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation.

57. In determining whether derogation measures are strictly required by the exigencies of the situation, the judgement of the national authorities cannot be accepted as conclusive.

D. Non-derogable rights

58. No State party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.

59. States parties to the Covenant, as part of their obligation to ensure the enjoyment of these rights to all persons within their jurisdiction (article 3, paragraph 1), and to adopt measures to secure an effective remedy for violations (article 2, paragraph 3), shall take special precautions in time of public emergency to ensure that neither official nor semi-official groups engage in a practice of arbitrary and extrajudicial killings or involuntary disappearances, that persons in detention are protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, and that no persons are convicted or punished under laws or decrees with retroactive effect.

60. The ordinary courts should maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

E. Some general principles on the introduction and application of a public emergency and consequent derogation measures

61. Derogation from rights recognized under international law in order to respond to a threat to the life of the nation is not exercised in a legal vacuum. It is authorized by law and as such it is subject to several legal principles of general application.

62. A proclamation of a public emergency shall be made in good faith based upon an objective assessment of the situation in order to determine to what extent, if any, it poses a threat to the life of the nation. A proclamation of a public emergency, and consequent derogations from Covenant obligations that are not made in good faith, are violations of international law.

63. The provisions of the Covenant allowing for certain derogations in a public emergency are to be interpreted restrictively.

64. In a public emergency the rule of law shall still prevail. Derogation is an authorized and limited prerogative to respond adequately to a threat to the life of the nation. The derogating State shall have the burden of justifying its actions under law.

65. The Covenant subordinates all procedures to the basic objectives of human rights. Article 5, paragraph 1, of the Covenant sets definite limits to actions taken under the Covenant:

> "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

Article 29, paragraph 2, of the Universal Declaration of Human Rights sets out the ultimate purpose of law:

> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

These provisions apply with full force to claims that a situation constitutes a threat to the life of a nation and hence enables authorities to derogate.

66. A bona fide proclamation of a public emergency permits derogation from specified obligations in the Covenant, but does not authorize a general departure from international obligations. The Covenant in articles 4, paragraph 1 and 5, paragraph 2, expressly prohibits derogations which are inconsistent with other obligations under international law. In this regard, particular note should be taken of international obligations which apply in a public emergency under the Geneva and ILO Conventions.

67. In a situation of a non-international armed conflict, a State party to the 1949 Geneva Conventions for the protection of war victims may not under any circumstances suspend the right to a trial by a court offering the essential guarantees of independence and impartiality (article 3 common to the 1949 Conventions). Under the 1977 additional Protocol II the following rights with respect to penal prosecution shall be respected under all circumstances by States parties to the Protocol:

(a) The duty to give notice of charges without delay and to grant the necessary rights and means of defence;

(b) Conviction only on the basis of individual penal responsibility;

(c) The right not to be convicted, or sentenced to a heavier penalty, by virtue of retroactive criminal legislation;

(d) Presumption of innocence;

(e) Trial in the presence of the accused;

(f) No obligation on the accused to testify against himself or to confess guilt;

(g) Duty to advise the convicted person on judicial and other remedies.

68. The ILO basic human rights conventions contain a number of rights dealing with such matters as forced labour, freedom of association, equality in employment and trade-union and workers' rights which are additional to those in the Covenant. Some of these are not subject to derogation during an emergency; others permit derogation, but only to the extent strictly necessary to meet the exigencies of the situation.

69. No State, including those that are not parties to the Covenant, may suspend or violate, even in times of public emergency:

The right to life;

Freedom from torture or cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation;

The right not to be held in slavery or involuntary servitude; and

The right not to be subjected to retroactive criminal penalties as defined in the Covenant.

Customary international law prohibits in all circumstances the denial of such fundamental rights.

70. Although protections against arbitrary arrest and detention (article 9) and the right to a fair and public hearing in the determination of a criminal charge (article 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency, and respect for them is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation. In particular:

(a) All arrests and detention and the place of detention shall be recorded, if possible centrally, and made available to the public without delay;

(b) No person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge;

(c) No person shall be held in isolation without communication with his family, friend or lawyer for longer than a few days, e.g. three to seven days;

(d) Where persons are detained without charge, the need for their continued detention shall be considered periodically by an independent review tribunal;

(e) Any person charged with an offence shall be entitled to a fair trial by a competent, independent and impartial court established by law;

(f) Civilians shall normally be tried by the ordinary courts; where it is found strictly necessary to establish military tribunals or special courts to try civilians, their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority;

(g) Any person charged with a criminal offence shall be entitled to the presumption of innocence and to at least the following rights to ensure a fair trial:

The right to be informed of the charges promptly, in detail and in a language he understands,

The right to have adequate time and facilities to prepare the defence including the right to communicate confidentially with his lawyer,

The right to a lawyer of his choice, with free legal assistance if he does not have the means to pay for it and to be informed of this right,

The right to be present at the trial,

The right not to be compelled to testify against himself or to make a confession,

The right to obtain the attendance and examination of defence witnesses,

The right to be tried in public save where the court orders otherwise on grounds of security with adequate safeguards to prevent abuse,

The right to appeal to a higher court;

(h) An adequate record of the proceedings shall be kept in all cases;

(i) No person shall be tried or punished again for an offence for which he has already been convicted or acquitted.

F. Recommendations concerning the functions and duties of the Human Rights Committee and United Nations bodies

71. In the exercise of its power to study, report and make general comments on States parties' reports under article 40 of the Covenant, the Human Rights Committee may and should examine the compliance of States parties with the provisions of article 4. Likewise it may and should do so when exercising its powers in relevant cases under article 41 and the Optional Protocol relating, respectively, to inter-State and individual communications.

72. In order to determine whether the requirements of article 4, paragraphs 1 and 2 have been met and for the purpose of supplementing information in States parties' reports, members of the Human Rights Committee, as persons of recognized competence in the field of human rights, may and should have regard to information they consider to be reliable provided by other intergovernmental bodies, non-governmental organizations and communications by individuals.

73. The Human Rights Committee should develop a procedure for requesting additional reports under article 40, paragraph 1 (b), from States parties which have given notification of derogation under article 4, paragraph 3, or which are reasonably believed by the Committee to have imposed emergency measures subject to the constraints of article 4. Such additional reports should relate to questions concerning the emergency in so far as it affects the implementation of the Covenant and should be dealt with by the Committee at the earliest possible date.

74. In order to enable the Human Rights Committee to perform its fact-finding functions more effectively it should develop its procedures for the consideration of communications under the Optional Protocol in order to permit the hearing of oral submissions and evidence and visits to States parties alleged to be in violation of the Covenant. If necessary, the States parties to the Optional Protocol should consider amending it to this effect.

75. The United Nations Commission on Human Rights should request its Sub-Commission on Prevention of Discrimination and Protection of Minorities to prepare an annual list of States, whether parties to the Covenant or not, that proclaim, maintain or terminate a public emergency together with:

- In the case of a State party, the proclamation and notification; and

- In the case of other States, any available and apparently reliable information concerning the proclamation, threat to the life of the nation, derogation measures and their proportionality, non-discrimination and respect for non-derogable rights.

76. The United Nations Commission on Human Rights and its Sub-Commission should continue to utilize the technique of appointment of special rapporteurs and investigatory and fact-finding bodies in relation to prolonged public emergencies.

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